Supreme Court, U.S.
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No. 04-1315

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.,

and

MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the Department of Labor's "Interpretation" of the Fair Labor Standards Act, codified at 29 C.F.R. § 552.109(a), providing that employees who are employed in domestic service employment to provide companionship services, but who are employed by entities other than the individual, family or household using their services, are exempt from the Act's minimum wage and overtime requirements under the Act's companionship exemption, 29 U.S.C. § 213(a)(15), entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)?

2. Granting 29 C.F.R. § 552.109(a) the deference it is due under either *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift*, 323 U.S. 134 (1944), should the federal courts apply the Department of Labor's interpretation of the Fair Labor Standards Act's companionship exemption, 29 U.S.C. § 213(a)(15), embodied in the regulation?

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RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Petition does not include the entire text of the statutory provision at issue. In full, 29 U.S.C. § 213(a)(15) exempts from both the minimum wage and maximum hour provisions of the Fair Labor Standards Act (FLSA):

> any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.

STATEMENT OF THE CASE

Petitioners failed to file a brief in the Court of Appeals.

The decision below, written by Chief Judge Walker, was unanimous and no judge on the Court of Appeals requested that a vote be taken on the petition for rehearing *en banc*. 1a-30a, 31a-32a.

ARGUMENTS FOR DENYING THE PETITION

I. THIS CASE DOES NOT RAISE ISSUES OF EXCEPTIONAL IMPORTANCE

Petitioners argue that this case is of exceptional importance because it would be expensive for employers of unskilled workers providing a range of domestic and personal services to elderly and disabled people in their homes to comply with the minimum labor standards Congress established in the FLSA. In 1937, however, President Roosevelt explained that embodied in the Act "are a few rudimentary standards of which we may properly ask general and widespread observance." S. REP. NO. 884, 75th Cong., 1st Sess. 3 (July 6, 1937). "Failure to observe them," Roosevelt continued, "must be regarded as socially and economically oppressive and unwarranted under almost any circumstances." *Id.* While the FLSA does provide a limited number of specific exemptions, additional payroll costs cannot be a reason for broadly construing an exemption because Congress obviously understood that compliance with the Act's minimum standards would cost employers money and yet this Court has repeatedly held that the Act's exemptions must "be narrowly construed." *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). Nevertheless, Petitioners argue that this Court should grant review because, if homecare employers are required to comply with the FLSA, they will reduce wages or hours, thereby harming homecare workers or the aged and

disabled people they care for. The Court should reject this argument for four reasons.

First, the argument advanced by Petitioners could be made in every case involving judicial construction of a federal law that has financial consequences for a class of people or entities. Every case construing the police and fire exemptions to the FLSA (29 U.S.C. § 207(k)), for example, has an impact on the finances of police and fire departments across the country and, consequently, on their ability to provide these essential services. But every such case cannot be reviewed by this Court. Thus, this Court has denied review in parallel cases. *See, e.g., Service Employees International Union, Local 102 v. County of San Diego*, 516 U.S. 1072 (1996) (denying review of decision striking down portion of Department of Labor regulation construing the three primary exemptions to the FLSA as applied to all public employees). This Court has never viewed the financial impact of a decision as sufficient reason for granting review.

Second, the factual basis for this argument is not properly before the Court because it consists exclusively of declarations filed with the Court of Appeals in support of Petitioners' Motion to Stay the Mandate. Thus, no court has found the factual assertions in the affidavits to be true and there are good reasons to believe they are not.[1] This Court therefore cannot accept the assertions as fact.

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[1] Petitioners' central factual assertion—that compliance with the FLSA's overtime requirement will dramatically increase the cost of services provided under the Medicaid program—is highly questionable. The Department of Labor (DOL), relying on data from the Bureau of Labor Statistics and the Department of Health and Human Services (HHS), determined in 2001 that affording minimum wage and overtime protection to homecare workers would "not produce a significant economic or budgetary impact on affected entities." 66 Fed. Reg. 5486 (Jan. 19, 2001). This conclusion was based on the facts that "more than 90 percent of the workers employed in the potentially affected occupational categories already receive the current federal minimum wage of $5.15 an hour or

Third, if the Petitioners and other employers relied in good faith on the regulation in establishing their compensation policies, as Petitioners assert in this Court, the FLSA itself provides a defense against liability. The Act provides that "no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act . . ., if he pleads and proves that the act or omission complained of was in good faith reliance on any

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higher" and "most of the workers . . . do not regularly work overtime (i.e., more than 40 hours per week)." *Id.* DOL specifically found that "there would be little impact from overtime wage costs if [the employees'] status was changed from exempt to non-exempt." *Id.* This assessment is consistent with other reports on Medicaid personal care services programs. (This is the program referenced in Petitioners' declarations. *See* 89a, 93a, 95a.) HHS funded research found that most states limit the number of hours of personal care services that they will fund under Medicaid and that the average limit is 4.8 hours per day. Leblanc, Tonner, and Harrington, *State Medicaid Programs Offering Personal Care Services*, 22 HEALTH CARE FINANCING REV. 155, 162 (2001). *See also* General Accounting Office, *Adults with Severe Disabilities: Federal and State Approaches for Personal Care and Other Services*, GAO/HEHS-99-101 75-76 (May 1999). In fact, New York places strict limits on the number of hours of personal care services available under its Medicaid program. New York establishes three levels of personal care services. Level I services may not exceed eight hours per week with up to four additional hours available only to those who need some or total assistance with meal preparation and who have no available informal caregivers or access to community resources. Level II and III services may not exceed four hours per day or 28 hours per week, with additional hours of services available only for those requiring total assistance who meet additional conditions. N.Y. Comp. Codes R. & Regs. tit. 18, §§ 505.14(a)(6)(i)(b), 505.14(a)(6)(ii)(b), and 505.14(a)(6)(iii)(c).

In addition, while Petitioners assert that some homecare workers spend 24 hours each day in a client's home, Petition at 10, if this is true, the entire 24 hours are not likely to be considered work time. *See* 29 C.F.R. §§ 785.22, .23.

written administrative regulation . . . or interpretation of the [Wage and Hour Division of the DOL]." 29 U.S.C. § 259(a).

As to prospective compliance, the Second Circuit's decision was issued on July 22, 2004. 1a. Thus, Petitioners and other employers of homecare workers in the Second Circuit have already had almost a full year to adjust their compensation practices to comply with the FLSA by compensating employees for overtime at the statutory rate or spreading work across more employees. Moreover, the Second Circuit's decision should not have come as a surprise to these employers. On January 19, 2001, the DOL published in the Federal Register a proposal to revise the regulation at issue in precisely the manner mandated by the Second Circuit on the grounds that the regulation was "inconsistent with . . . section 13(a)(15) of the FLSA." 66 Fed. Reg. 5485 (Jan. 19, 2001). The DOL articulated precisely the same compelling reasons for rejecting the current regulation adopted by the Second Circuit. *See id.* While this proposed regulation did not become final (for reasons unrelated to its statutory merits as explained *infra* at 25 n.18), its promulgation gave homecare employers ample notice that the current regulation is not consistent with the Act. Yet as of January 14, 2005, Petitioner Long Island Care at Home's Vice President states that Petitioners were not paying their employees in compliance with the FLSA. 79a-80a ¶ 3. Petitioners and other employers have simply chosen to continue to violate the FLSA even after the Second Circuit's decision.

Fourth, Petitioners' argument that reimbursement rates for that portion[2] of their services that is provided under Medicaid limit their ability to comply with the FLSA is not grounds for review and is legally erroneous. All employers could argue that their customers' unwillingness to pay more limits their

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[2] Petitioners do not suggest that all their services or those of other similar agencies are provided under Medicaid. 79a-82a.

ability to comply with the FLSA. Thus, this cannot be grounds for Supreme Court review.

Moreover, the Medicaid program can, will, and, indeed, must adjust to any increase in costs required by law. New York provides that a factor to be considered in setting personal care service payment rates is "the applicable minimum wage laws." N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(6)(ii)(d). If there is a change in the applicable wage and hour law or its construction, reimbursement rates can and must be adjusted to compensate for resulting changes in costs. New York specifically permits providers to request revision of reimbursement rates, *inter alia,* where the provider "has incurred new or unanticipated costs for programs or services mandated or approved by the department and . . . the cost report that the provider submitted to the department does not reflect the provider's actual costs for reasons beyond the provider's control." N.Y. Comp. Codes R. & Regs. tit. 18, § 505.14(h)(7)(iii)(c)(2).[3] In fact, the President of the New York State Association of Health Care Providers acknowledges that rates can "be adjusted to accommodate the higher overtime costs." 129a.

In fact, under Medicaid's "equal access" provision,[4] New York's and other states' payment rates "must bear a reasonable relationship to provider costs." *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1498 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998). If a state did not consider provider

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[3] None of the declarations submitted by Petitioners state that this mechanism has been invoked without success.

[4] "A state plan for medical assistance must provide . . . such methods and procedures relating to the . . . payment for . . . care and services available under the plan . . . as may be necessary . . . to assure that payments are consistent with . . . quality of care and are sufficient to enlist enough providers so that care and services are available under the plan to the extent such care and services are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A).

costs in setting its rates, its action would be "arbitrary and capricious." *Id.* at 1500. If, as Petitioners assert, adequate care requires, in some instances, that homecare workers work more than 40 hours in a week, the states are obligated to consider the resulting obligation to pay for that time at overtime rates in setting reimbursement levels. This is because reimbursement rates must be "high enough to provide for quality care and to ensure access to services." *Id.* at 1497. *See also Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Svcs.*, 364 F.3d 925, 929-31 (8th Cir. 2004); *Methodist Hospitals, Inc. v. Sullivan*, 91 F.3d 1026, 1030 (7th Cir. 1996) ("the state may (and under § 1396a(a)(30), must) raise the price until the market clears"); *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519, 530-31 (8th Cir. 1993). *Cf. Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 524 (1990) (parallel provision[5] applicable to covered services provided in institutions "creates a right . . . to have the State adopt rates that it finds are reasonable and adequate rates to meet the costs of an efficient and economical health care provider"). In other words, the states are obligated to set reimbursement rates at levels that insure the availability of adequate services considering applicable wage and hour laws.

For these reasons, this case does not raise issues of exceptional importance.

II. THERE IS NO SPLIT IN THE CIRCUITS

Petitioners argue that the Second Circuit's decision is in conflict with that of the Tenth Circuit in *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir. 2001), *cert. denied*, 531 U.S. 1072 (2001). This is incorrect for four reasons.

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[5] *See Arkansas Medical*, 6 F.3d at 525 ("the equal access provision is very analogous to the Boren Amendment examined in *Wilder*").

First, the Tenth Circuit's discussion of this issue is *dicta* as the court holds that the employees at issue were not employed in a "private home" under 29 C.F.R. § 552.3, thus were not engaged in "domestic service employment," and, therefore, did not fall within the companionship exemption. *Id.* at 562-66. The court's holding was that the employees were not exempt. *Id.* at 566. Its cursory discussion of whether employees of a third-party employer *could* fall within the companionship exemption *if* they were otherwise exempt is therefore *dicta*.

Second, as the Second Circuit noted, the Tenth Circuit's decision predated this Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001). 221a-22a. The Second Circuit followed *Mead*, as explained *infra* at 11-12, in holding that the regulation was not entitled to *Chevron* deference. For this reason, the decisions do not conflict.

Third, the employees in *Johnston* did not argue that the third-party employer regulation was not entitled to *Chevron* deference. *See* 213 F.3d at 562. Thus, the Tenth Circuit did not address the issue in relation to which the Petitioners argue that the Second Circuit's decision is in conflict with a decision of this Court—the degree of deference owed the third-party employer regulation. The Tenth Circuit was asked only whether the regulation was valid under *Chevron*, while the Second Circuit was asked whether the regulation was entitled to *Chevron* deference and, if not, whether it was valid under *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). These are different questions and, therefore, the courts' answers to them cannot and do not conflict.

Finally, the decision of the Tenth Circuit does not present this Court with the type of fully analyzed and considered conflict among the circuits that is a precondition of review. The Tenth Circuit's decision contains merely a conclusion

and is wholly barren of analysis. *In full*, the Tenth Circuit's decision states the following concerning the question at issue:

> The contention that the exception does not apply to domestic services employees who are not employed directly by an individual in need of care; or his or her family has been rejected by the courts that have been confronted with the same question. . . . [6] We are persuaded that the secretary's interpretation is not arbitrary, capricious, or manifestly contrary to § 213(a)(15).

213 F.3d at 562. The Second Circuit was, therefore, correct when it observed "that none of these prior cases carefully considered the question before us now." 21a.

Permitting further circuit court adjudication in this area would be prudent because contrary to Petitioners' assertion that the Second Circuit's decision disrupts 30 years of employer reliance on the regulation, the issue is actually of very recent vintage. This is because the homecare industry is

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[6] The Tenth Circuit here cited footnotes in two District Court decisions, *Terwilliger v. Home of Hope, Inc.*, 21 F.Supp.2d 1294, 1299 n. 2 (N.D.Okla. 1998), and *Madison v. Resources for Human Development, Inc.*, 39 F.Supp.2d 542, 545 n. 3 (E.D.Pa. 1999), *vacated on other grounds*, 233 F.3d 175 (3d Cir. 2000). *See Johnston*, 213 F.3d at 562. These decisions contain no more analysis than *Johnston*. The degree of deference was not at issue in *Terwilliger*. It does not appear that the plaintiff argued that the regulation was not entitled to *Chevron* deference or that it was invalid. Indeed, the Court notes that "Plaintiff has identified no authority, and the Court is unable to locate any, that supports his view of the companionship exemption." 21 F.Supp.2d at 1299 n. 2. In the absence of any argument or authority, the Court simply applies the regulation. Similarly, the footnote in *Madison* does not suggest that the question of the validity of the regulation was even at issue. The Court simply cites the regulation and states that the fact that the plaintiffs are employed by a third party "does not exclude them from the exemption." 39 F.Supp.2d at 545 n. 3. Moreover, as in *Johnston*, the statement is *dicta* as the Court holds that the employees are not exempt because they did not work in a private home. *Id.* at 545-48.

of recent vintage. As the DOL explained in proposing revisions to the companionship regulations in 2001, "[t]he home care industry has changed dramatically since the Department published the 1975 regulations." 66 Fed.Reg. 5483 (Jan. 19, 2001). The combination of a growing demand for long-term care, consumer preference for and social policy in favor of in-home care, and expanded Medicaid and Medicare coverage of such care has led to dramatic, *recent* growth in the number of third-party agencies employing homecare workers and the number of such workers (which tripled between 1988 and 1998). *Id.* Thus, the question addressed by the Second Circuit—whether the companionship exemption applies to employees of third-party agencies—has, as a practical matter, only arisen in the last few years and other courts of appeal should be given an opportunity to consider it before this Court determines whether its review is necessary.

III. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

A. The Court of Appeals' Decision is Consistent with This Court's Decision in *Mead*

In *Mead*, this Court reaffirmed the principle that "judicial responses to administrative action must continue to differentiate between *Chevron* and *Skidmore*." 533 U.S. at 311. Petitioners, therefore, do not and cannot dispute the distinction drawn by the Second Circuit between legislative and interpretative regulations or the conclusion that interpretive regulations are entitled to a lesser degree of deference. Rather, Petitioners argue that the Second Circuit's classification of the third-party employer regulation as an interpretation entitled only to *Skidmore* deference conflicts with this Court's decisions. Yet, Petitioners do not point to any specific conflict and none exists.

1. The Second Circuit's holding that the third-party employer regulation is an "interpretive" regulation not entitled to *Chevron* deference was expressly based on this Court's decision in *Mead*. *Mead* holds that in order for agency action to qualify for *Chevron* deference, (1) Congress must delegate law making authority to an agency and (2) the agency action must be pursuant to that delegation. This Court held that *Chevron* deference is not appropriate "[1] where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or [2] where such authority was not invoked." 533 U.S. at 237. The Second Circuit expressly based its holding on the second prong of the *Mead* test,[7] "*Mead* holds that administrative implementation of a particular statutory provision does not qualify for *Chevron* deference unless 'it appears that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" 23a (quoting *Mead*, 533 U.S. at 226-27). Pursuant to the quoted language from *Mead*, the

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[7] Scholars have described *Mead*'s second prong as follows: "in *Mead* the Court made clear that it is only when the agency actually employs its delegated authority to make a legal determination that it will be accorded *Chevron* deference." Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1196 (2004). *See also id.* at 1164. They have noted that this prong was reiterated in "[t]hree of the Court's statements." *Id.* at 1164. Indeed, even prior to *Mead*, scholars of administrative law agreed:

> When an agency has a choice to proceed legislatively or nonlegislatively, its contemporaneous description is the most reliable test of what it actually did. . . . [I]t is appropriate to accept the agency's description of which alternative it chose at the time it made the choice. Deference to the agency's label also promotes certainty and predictability of result and provides agencies with reasonable assurance that reviewing courts will honor their decision to proceed nonlegislatively.

Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 389.

Second Circuit correctly held that the regulation "does not qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority." 23a. The Second Circuit's decision is consistent with *Mead*.[8]

2. Nor is the Second Circuit's decision inconsistent with any of the other decisions of this Court cited by Petitioners only in note 10 of their Petition. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), was decided prior to *Chevron* and did not involve the question of the degree of deference due agency regulations. Moreover, *Chrysler* cannot stand for the proposition asserted by Petitioners—that all regulations "affect[ing] individual rights and obligations" are legal regulations—or it would reduce the category of interpretative regulations to a virtual null set and render the *Mead* test described above inoperable.[9] In fact, *Chrysler* makes clear that the fact "[t]hat an agency regulation is 'substantive' . . . does not by itself give it the 'force and effect of law.'" *Id.* at 302. Rather, "the exercise of quasi-legislative authority by governmental departments . . . must be rooted in a grant of such power by the Congress." *Id.* Here, the Second Circuit correctly held that the DOL did not "root" its actions in such a grant of power.

Petitioners cite *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), and *Edelman v. Lynchburg College*, 535 U.S. 106, 123-24 (2002) (O'Connor, J., concurring), to suggest that *Chevron* deference is always owed agency interpretations embodied in a regulation. But the quoted language

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[8] Petitioners cannot argue that the Second Circuit's decision is inconsistent with *Mead* because *Mead* says no more about the second prong of its analysis as its holding is grounded on the first prong. *Id.* at 231.

[9] Far from being accepted by this Court, the "substantial impact test," suggested by Petitioners, had "been rejected by most courts" even prior to *Mead*. Asimow, *Nonlegislative Rulemaking*, 1985 DUKE L.J. at 398.

from *Christensen* is *dicta*, as that case involved an opinion letter, and must be read to be consistent with the Court's citation of its earlier decision in *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991), for the proposition that "interpretative *rules* . . . are 'not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers.'" *Christensen*, 529 U.S. at 587 (emphasis added). The cited portion of Justice O'Connor's concurrence in *Edelman* merely provides an alternative ground for the majority's holding. In addition, it states only that, because the regulation at issue in that case was codified in the Code of Federal Regulations, it "is binding on all the parties coming before the EEOC, as well as on the EEOC itself." 535 U.S. at 123-24. Justice O'Connor did not suggest that codification of an interpretation in a regulation necessarily binds federal courts under *Chevron*. Moreover, *Mead* states that promulgation of a regulation, even by notice and comment rulemaking, is not determinative of the degree of deference owed. 533 U.S. at 230-31. In *Mead*, this Court explained that "interpretive *rules* . . . enjoy no *Chevron* status as a class." 533 U.S. at 232 (emphasis added).[10]

Finally, the Second Circuit found that the DOL did not comply with the notice and comment requirements of the Administrative Procedure Act when it promulgated the third-party employer regulation. 24a-25a. *See infra* at 26-27.

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[10] One scholar explained, "It is clear . . . that the Court was greatly concerned that making procedural formality a necessary condition for *Chevron* deference, *as well as a sufficient condition*, would be too crude an approach." Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 349 (2003). The Second Circuit cites language in this article stating that notice and comment procedures afford agencies a "safe harbor." 25a. But this is true only if the agency was seeking to enact legislative rules pursuant to authority delegated by Congress. If, as here, the agency expressly declined to use its delegated authority, it has chosen not to dock in the "safe harbor."

Thus, *Chrysler* supports the Second Circuit's holding because *Chrysler* holds that "a procedural defect in the . . . regulations [—"lack of strict compliance with the APA"—]. . . precludes courts from affording them the force and effect of law." 441 U.S. at 312. *Cf. Edelman*, 535 U.S. at 123 ("The regulation was also promulgated pursuant to sufficiently formal procedures . . . . pursuant to notice-and-comment procedures"). The Second Circuit's decision is consistent with the decisions of this Court.

3. Petitioners do not, in fact, argue that the Second Circuit misconstrued *Mead*. Rather, Petitioners argue that the DOL did exercise its delegated authority when it promulgated the regulation. Petition at 17. This is not grounds for Supreme Court review. Supreme Court Rule 10 provides that "[a] writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Moreover, the Petitioners are factually wrong. In 1975, when the regulation was promulgated, the DOL was well aware of the distinction between substantive and interpretive regulations as well as the different degrees of deference they were due and the DOL knowingly and intentionally characterized the third-party employer regulation as an interpretation. The distinction is embodied in the Administrative Procedures Act, 5 U.S.C. § 553(b)(3)(A) and (d)(2). The Attorney General's 1947 *Manual on the Administrative Procedure Act* made clear that only substantive rules "have the force and effect of law." *See Chrysler*, 441 U.S. at 302 n. 31 (quoting *Manual* at 30 n. 3). In fact, the DOL has itself long defined the term "interpretation" "to describe a statement 'ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language.'" 29 C.F.R. § 790.17(c). The DOL has also made clear that "[a]dvisory interpretations announced by the Administrator serve only to indicate the construction of the law

which will guide the Administrator in the performance of his administrative duties." 29 C.F.R. § 775.1 (promulgated December 5, 1946).

With this knowledge of administrative law principles, the DOL has, since as early as 1949, divided its FLSA regulations into "general regulations" and "interpretations." For example, the three primary exemptions to the Act are for executive, professional and administrative employees. *See* 29 U.S.C. § 213(a)(1). Since 1949, the DOL has promulgated regulations relating to these exemptions that are expressly classified as "general regulations" and "interpretations." *See* 14 Fed. Reg. 7705, Subpart A—General Regulations (Dec. 24, 1949); 14 Fed. Reg. 7730, Subpart B—Interpretations (Dec. 28, 1949); 29 C.F.R. Part 541, Subpart A—General Regulations, Subpart B—Interpretations (2004).

Following this pattern, the regulations promulgated after the adoption of the 1974 amendments were divided into "General Regulations," promulgated pursuant to DOL's express authority to "define[] and delimit[]" the term "companionship services," and "Interpretations." *See* 29 C.F.R. Part 552, Subparts A and B; 40 Fed. Reg. 7404, 7405, 7406 (Feb. 20, 1975). The regulations themselves expressly state that "[t]he definitions required by section 13(a)(15) [of the FLSA] are contained in §§ 552.3, 552.4, 552.5 and 552.6." 29 C.F.R. § 552.2(c). The regulation defining companionship services, 29 C.F.R. § 552.6, is within these "General Regulations" providing the statutorily required definitions. In contrast, the DOL classified its regulation concerning third-party employment among its "Interpretations." *See* 29 C.F.R. Part 552, Subpart B, § 552.109(a). The DOL's 1974 Notice of Proposed Rulemaking also clearly stated that it was the DOL's intention "to add a new 29 CFR Part 552 defining and delimiting, *in Subpart A*, the terms . . . 'employment to provide companionship services for individual who (because of age or infirmity) are unable to care for themselves and

setting forth, *in Subpart B*, a statement of policy and interpretation concerning the application of the Fair Labor Standards Act to domestic service employees." 39 Fed. Reg. 35382 (Oct. 1, 1974) (emphasis added). The Second Circuit thus correctly held that "the regulation at issue . . . is effectively conceded by the DOL not to have been promulgated pursuant to Congress's express legislative delegation in § 213(a)(15)." 23a.[11]

The courts of appeal are in complete harmony in according the DOL's "interpretations" of the statutory exemptions only *Skidmore* deference. In two previous decisions, the Second Circuit specifically held that the DOL's "interpretations" of the § 213(a)(1) executive, administrative and professional employee exemptions are not entitled to *Chevron* deference. Considering the DOL's regulations relating to the exemption of administrative employees, the court held, "In contrast to the controlling authority given the Secretary's legislative rules—i.e. those promulgated pursuant to an express grant of congressional authority—the respect accorded the Secretary's interpretive regulations depends on their persuasiveness."

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[11] Petitioners' arguments to the contrary are unconvincing. First, Petitioners' primary argument simply takes the words "by virtue of section 13(a)(15) [of the FLSA]" in the regulation out of context. Petition at 18. The regulation does not state that it was promulgated pursuant to the authority given DOL in § 13(a)(15) to "define[] and delimit[]" the exemption's terms, but merely cites the statutory basis for the exemption of companions. 29 C.F.R. § 552.109(a). Obviously, "both legislative and interpretive rules frequently interpret the meaning of language in a statute" and thus cite the statute. Asimow, *Nonlegislative Rulemaking*, 1985 DUKE L.J. at 384. Therefor, mere citation of a statute cannot render a rule legislative. Second, the reference to § 213(a)(15) as "authority" for all the regulations "unless otherwise noted" is also not on point when the regulations specifically notes that only §§ 552.3-552.6 contain "[t]he definitions required by section 13(a)(15)." 29 C.F.R. § 552.2(c). Finally, the 1974 Notice of Proposed Rulemaking fully supports the Second Circuit's decision as explained in the text *supra* at 15-16.

Reich v. New York, 3 F.3d 581, 587 (2d Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994). The Second Circuit reached the same conclusion concerning the codified "Interpretations" of the Act's professional employee exemption in *Freeman v. National Broadcasting Co.*, 80 F.3d 78, 83 (2d Cir. 1996) ("not binding and do not have the force of law"). All other circuits that have addressed the issue have agreed. *See Shaw v. Prentice Hall Computer Publishing, Inc.*, 151 F.3d 640, 642 (7th Cir. 1998) ("interpretive regulations" concerning administrative and professional employee exemptions "serve as guides to the Secretary's view of the Act's application . . . [but] do not have the force of binding law"); *Reich v. Newspapers of New England*, 44 F.3d 1060, 1070 (1st Cir. 1995) (unlike general regulations, interpretations concerning professional employee exemption entitled to *Skidmore* not *Chevron* deference); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 n. 18 (3d Cir. 1994) ("The DOL interpretations [of the professional employee exemption] do not have the force of law."); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990) (according interpretation of professional employee exemption only *Skidmore* deference). In fact, the Ninth Circuit, like the Second, cited *Mead* to support its holding that "these interpretive rules are not binding" and "enjoy no *Chevron* status." *Brigham v. Eugene Water & Electric Bd.*, 357 F.3d 931, 940 (9th Cir. 2004).

Petitioners' final argument is that the Second Circuit should have deferred to the argument of DOL's counsel in its amicus brief that the third-party employer regulation is entitled to *Chevron* deference. Petition at 22. But the question before the court was not one of construction of the regulation, but classification of the regulation as legal or interpretive. This classification is not "a creature of the Secretary's own regulations" and thus the Secretary's arguments are entitled to no deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The DOL's brief did not in any way construe the regulation. *Cf. id.* (brief "interprets the salary-

basis test," contained in a DOL regulation, "to deny exempt status" under specific conditions). Rather, the brief contains a mere assertion followed by a factual observation. DOL's counsel's complete argument on this point states:

> Like section 552.6, section 552.109(a) served to 'define and delimit' the terms of the "companionship services' exemption under Congress' express delegation of authority. Similarly, section 552.109(a) is the product of the notice and comment rulemaking that took place shortly after the section 13(a)(15) "companionship services" exemption was enacted in 1974.

66a. These two sentences contain no construction of the regulation. The brief contains only a spare legal argument which is not entitled to deference.[12]

Moreover, even if the first sentence quoted above is considered a construction of the regulation, no deference is warranted because "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). Here, the regulations expressly and unambiguously state that the "definitions required by section 13(a)(15) [of the FLSA] are contained in [the "General Regulations," specifically] §§ 552.3, 552.4, 552.5 and 552.6" and thus not in the Interpretations, including § 552.109(a). 29 C.F.R. § 552.2(c). Counsel's assertion is directly contrary to the clear statement in the regulations.

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[12] Again, scholars agree that "[s]ubsequent characterization by counsel" of a regulation as legislative or interpretive is not entitled to deference. Asimow, *Nonlegislative Rulemaking*, 1985 DUKE L.J. at 390 n. 40. *See also Levesque v. Block*, 723 F.2d 175, 181 (1st Cir. 1983) ("agency's contemporaneous characterization of its action" is "highly relevant," but it would be "both unfair and disingenuous to allow the Secretary to say later [through counsel] that he didn't mean it. . . . [W]e are inclined to give little weight to an agency's *post hoc* reconstruction of its efforts and intentions.")

. Finally, the DOL's counsel did not claim to be construing the regulation and thus did not seek deference for his construction in the Second Circuit and neither did the Petitioners as they failed to file a brief below.

The Second Circuit expressly and correctly followed this Court's decision in *Mead* in according the third-party employment regulation only that deference required by *Skidmore*.

B. Petitioners Fail to Demonstrate that the Outcome Below Would Have Been Different had *Chevron* Deference Been Accorded

In the text of the Petition, the only error Petitioners argue the Second Circuit made was in the level of deference it accorded the regulation. Petitioners do not argue that, had the Second Circuit granted *Chevron* deference, the outcome would have been different. Petitioners make this argument only in a footnote. Petition at 25-26 n. 13. Yet this Court ordinarily denies review when a reversal would not change the relative rights of the parties in any concrete fashion. *See* Robert L. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002). Because the regulation would be held invalid even if it was accorded *Chevron* deference, this Court should not grant review.

1. *The Regulation is Inconsistent with the Text of the Act*

The FLSA does not exempt employees employed "to provide companionship services" to the elderly or infirm. Rather, it exempts only employees *"employed in domestic service employment* to provide companionship services" to the aged or infirm. 29 U.S.C. § 213(a)(15) (emphasis added). The third-party employer regulation renders the phrase "employed in domestic service employment" wholly superfluous. Congress did not intend the phrase to be meaningless.

Rather, it intended it to have its ordinary meaning—employed in a household by the household. The regulation is thus inconsistent with the plain meaning of the full text of the exemption.

2. *Congress Did Not Intend to Exclude Companions Employed by Third Parties*

Consistent with the plain text, the overall purpose of the amendments and their legislative history both demonstrate that Congress did not intend to exempt third-party employers, such as Petitioner Long Island Care at Home,[13] from minimum wage and overtime requirements, allowing them, for example, to pay their employees less than the minimum wage so long as they provide companionship services.

Congress intended the term "domestic service employment" to encompass only employment within a home by the homeowner. "[T]he authoritative source for legislative intent . . . [—] the Committee Reports on the bill"—so state. *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986).[14] The Senate Report explained that "[t]he generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of a person by whom he or she is employed." 2 *Legislative History of the Fair Labor Standards Amendments of 1974* 1524 (1976) (S. REP. NO. 93-690, 93rd Cong., 2d Sess. 20) (hereinafter *Legislative History*). *See also* 2 *Legislative*

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[13] Petitioner employs approximately 40 homecare workers and possibly other workers. 79a.

[14] *See also Garcia v. United States*, 469 U.S. 70, 76 (1984). Likewise, in *Zuber v. Allen*, 396 U.S. 168, 186 (1969), this Court explained that "[a] committee report represents that considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation."

History 2144 (H.R. REP. NO. 93-913, 93rd Cong., 2d Sess. 35 (March 15, 1974)).

It was only domestics employed within the home by the home owner who were even at issue in Congress in 1974 when the exemption was adopted. The FLSA had not previously extended to such domestics employed by individuals and families because there was doubt about whether they were engaged in interstate commerce. Thus, the amendments contained an express finding that domestic service employment affects commerce. Pub.Law 93-259, §7, 88 Stat. 62 (1974) (codified at 29 U.S.C. § 202(a)).[15] There was no such question concerning domestics employed by agencies. The pre-1974 Act already covered domestic employees employed by third parties. *See* 39 Fed. Reg. 35385 (Oct. 1, 1974) (DOL finding that "[e]mployees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services . . . . [were] subject to the Act prior to the 1974 amendments.") The amendments extended coverage to domestics employed by those in whose homes they worked

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[15] That the intent of the amendment was to extend the Act's coverage to domestics employed by individuals is made clear by the objection frequently expressed during the debates over the amendments that such an extension would impose an intolerable burden on "housewives." *See, e.g.*, 1 *Legislative History* at 250, 281, 727, 952, 954 (1976) (119 Cong. Rec. 18155 (June 5, 1973), 18341 (June 6, 1973), 24365 (July 17, 1973), 24797 (July 19, 1973), 24798 (July 19, 1973)) ("putting on the private individual the onus"); 2 *Legislative History* 1676, 1815 (120 Cong. Rec. 4708 (Feb. 28, 1974), 5275 (March 5, 1974)) ("adding additional record-keeping and other chores for the American housewife"). Echoing this theme, the Secretary of Labor's statement of opposition to the amendments made clear that he understood "domestic service" to mean "[a] household who hires a maid." 2 *Legislative History* 1814 (120 Cong. Rec. 5275 (March 5, 1974)). "It may be unrealistic to expect accurate recordkeeping, the Secretary observed, because "[h]omemakers are not engaged in business in the traditional sense with experience in maintaining business records." *Id.*

except for those domestics employed as baby-sitters and companions. Obviously, Congress did not intend for the exception to the extension of coverage to be broader than the extension itself.

This was exactly the reasoning of the DOL when it considered the matter in the very wake of the amendments in the fall of 1974. On October 1, 1974, the DOL published a proposed interpretive regulation in the Federal Register providing, "Employees who are engaged in providing . . . companionship services and who are employed by an employer other than the families or households using such services, are not exempt under section 13(a)(15) of the Act." 39 Fed. Reg. 35385 (Oct. 1, 1974). The DOL reasoned, "This results from the fact that their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." *Id.*[16]

The notice of final rule making replaced the proposed regulation with its opposite—the current regulation. 40 Fed.

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[16] When the DOL proposed amending this regulation in 2001, it again explained:

> Under the 1974 Amendments, Congress extended coverage of the FLSA to domestic service employees who were not previously covered, i.e., those who worked only for a private family and not for a covered enterprise. Anyone who prior to 1974 had worked for a covered placement agency, for example, but who was assigned to work in someone's home, would have been covered previously by the FLSA. The Department believes that Congress did not intend the 1974 amendments to change the status of workers already covered by the FLSA, but only intended to exclude casual baby-sitters and companions from those newly covered by the law, that is, those exclusively employed by the homeowner or family member.

66 Fed. Reg. 5485 (Jan. 19, 2001).

Reg. 7404 (Feb. 20, 1975). The DOL noted the change, but provided a wholly inaccurate explanation:

> The one major change in Part 552 is in § 552.109 which deals with 'third party employment.' This section as originally proposed would not have allowed the section 13(a)(15) . . . exemption for employees, who, although providing companionship . . . are employed by an employer or agency other than the family or household using their services. On further consideration, I have concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services.

40 Fed. Reg. 7404 (Feb. 20, 1975). This reasoning is flawed because it does not accurately reflect the terms of the exemption. The exemption does not apply to "any employee engaged in companionship services" as the DOL suggested, but only to "employees *employed in domestic service employment* to provide companionship services." 29 U.S.C. § 213(a)(15) (emphasis added). By leaving out the critical limiting terms, the DOL improperly broadened the scope of the exception to the extension of the Act's coverage beyond the scope of the extension itself.

Congress did not intend to exempt companions employed by third parties.

3. *The Regulation is Directly Contrary to Another DOL Regulation*

The third-party employer regulation is directly contrary to another DOL regulation and, therefore, both regulations cannot be upheld even granted *Chevron* deference. The Department's definition of domestic service covers only "service of a household nature performed by an employee in or about a private home (permanent or temporary) *of the person by whom he or she is employed.*" 29 C.F.R. § 552.3 (emphasis added). Companionship services are a subset of

domestic services. *See* 29 U.S.C. §213(a)(15) ("any employee employed in domestic service employment to provide companionship services"). Thus, under the DOL's own definition of "domestic service employment," companionship services must be performed for "the person by whom [the provider of such services] is employed." As the Second Circuit correctly found, there is thus a "stark internal inconsistency" between the regulation providing that companions may be employed by third parties and the definition of domestic services of which companionship services are a subset. 27a-28a.[17] Even granted *Chevron* deference, both regulations cannot possibly be upheld.

4. *The DOL has Twice Explained that Companions Employed by Third Parties Should Not be Exempt*

As explained *supra* at 22-23, when the DOL first proposed regulations concerning the companionship exemption in the fall of 1974, it proposed an interpretive regulation providing that companions employed by third parties were not exempt. In 2001, the DOL proposed a revision of the third-party employer regulation on the grounds that the current regulation is inconsistent with Congress' intent. 66 Fed. Reg. 5485 (Jan. 19, 2001). The DOL proposed a regulation providing that companions employed by third parties are not exempt. 66 Fed. Reg. 5488 (Jan. 19, 2001). In neither case did the DOL provide an adequate explanation of why it did not adopt the

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[17] In the proposed revisions of these regulations discussed *infra* at 24-25, the DOL agreed that "the current regulations contain an internal inconsistency, because they allow the companion . . . exemption[] to be applied to an employee employed by someone other than the person in whose private home the work is being performed." 66 Fed. Reg. 5485 (Jan. 19, 2001).

proposed regulation as final.[18] Thus, while the agency's current regulation is to the contrary, its twice articulated, uncontradicted and persuasive reasoning demonstrates that Congress did not intend to exempt employees of third parties.

5. *The Regulation is Inconsistent with Other DOL Regulations*

The Department's regulations provide that babysitters employed by third parties are not exempt under the § 213(a)(15) exemption. 29 C.F.R. § 552.109(b). Yet the statutory exemption pairs "babysitting services" and "companionship services" and the two were talked about in the same breath in Congress. In fact, companionship services were defined by reference to babysitting services.[19] There is no basis for treating companions employed by third parties differently than babysitters employed by third parties. Thus, the DOL's regulation are internally inconsistent on this point as well.

For all of these reasons, even if the regulation was accorded *Chevron* deference, it is clearly inconsistent with

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[18] The faulty explanation for the rejection of the original proposed regulation is discussed *supra* at 23. The 2001 proposal was withdrawn in 2002, *see* 67 Fed. Reg. 16668 (April 8, 2002), but, as the Second Circuit explained, on grounds "that have no bearing on the . . . relevant question of what Congress intended in 1974." 28a.

[19] During floor debate in the Senate, Senator Williams, Chair of the Labor Subcommittee, explained the word "companion" with reference to babysitting:

> We use the situation in which people are in a household not to do household work but are there, first, as babysitters. I think we all have the full meaning in mind of what a babysitter is there for—to watch the youngsters. "Companion," as we mean it, is in the same role—to be there and to watch an older person, in a sense.

1 *Legislative History* 963 (119 Cong. Rec. 24801 (July 19, 1973)). After this explanation, another senator interjected, "In other words, an elder sitter," and Senator Williams replied, "Exactly." *Id.*

Congress' intent and, thus, the Second Circuit correctly declined to apply the regulation.

C. If the Third-Party Employment Regulation is Not Interpretive, It is Invalid Under the APA

If this Court were to grant review and hold that the regulation is not interpretive, then it would have to remand to the Second Circuit for a determination of whether the regulation is nevertheless invalid because it was not promulgated in compliance with the Administrative Procedure Act's notice and comment requirements. 5 U.S.C. § 553(b). The Second Circuit would be bound by its own precedent to hold the regulation invalid for this reason.

As explained *supra* at 22-23, the notice of proposed rule making that led to the third-party employment regulation informed the public that employees of third parties were *not* exempt, *see* 39 Fed. Reg. 35385 (Oct. 1, 1974), but the final regulation provided exactly the opposite. *See* 40 Fed. Reg. 7404 (Feb. 20, 1975). This did not satisfy the APA's notice requirement under Second Circuit law.

The Second Circuit has held that "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986) (quoting *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C.Cir. 1985)). This was clearly the case here, where the final regulation was the exact opposite of the proposed regulation. Indeed, this case is almost identical to *Black Media*. There, the FCC promulgated a notice of proposed rule making announcing it would include a minority preference policy in rules governing applications for broadcast licenses, but "then it declined to do so in its final report without providing a meaningful opportunity for comments as required by [the APA]." 791 F.2d at 1018. Here, the DOL announced that the exemption would not apply to employees

of third parties, and then the DOL promulgated a final regulation providing that it would. This did not comply with the APA. As the Second Circuit found, the regulation was promulgated after "substandard notice and comment procedure." 25a. A legislative regulation promulgated without complying with the APA is invalid, *see, e.g., Black Media*, 791 F.2d at 1024.

Thus, if the regulation is legislative, it would be held invalid by the Second Circuit under the APA.

IV. PETITIONERS' PROCEDURAL ARGUMENT IS NOT PROPERLY BEFORE THIS COURT AND IS BASELESS

The second question presented by Petitioners is based on a procedural argument—that the court of appeals should not have declined to defer to the regulation "at the pleading stage of the proceedings, without any consideration of facts that support the agency's judgment." Petition at 13. This argument is not properly before this Court and is baseless.

The argument is not properly before this Court because it was Petitioners who moved for judgment on the pleadings in the District Court. 36a. At that time, Petitioners made no attempt to introduce the evidence they now say is necessary despite knowing that the validity of the regulation was at issue. *See* Petition at 6, 5a. In addition, neither Petitioners nor the DOL made this argument in the court of appeals. In fact, Petitioners did not file a brief in the court of appeals. The procedural argument has, therefore, been waived.

Moreover, the procedural argument is baseless. The "facts that support the agency's judgment" are only those that were before the agency and relied on by the agency. They are legislative not adjudicative facts. Petitioners were free to cite those facts in their motion for judgment on the pleadings and in their appellate brief (had they filed one). Petitioners were,

therefore, not prejudiced by their own action of filing a motion for judgment on the pleadings which precluded the introduction of evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 04-1315

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD.,

and

MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the Department of Labor's "Interpretation" of the Fair Labor Standards Act, codified at 29 C.F.R. § 552.109(a), providing that employees who are employed in domestic service employment to provide companionship services, but who are employed by entities other than the individual, family or household using their services, are exempt from the Act's minimum wage and overtime requirements under the Act's companionship exemption, 29 U.S.C. § 213(a)(15), entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)?

2. Granting 29 C.F.R. § 552.109(a) the deference it is due under either *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift*, 323 U.S. 134 (1944), should the federal courts apply the Department of Labor's interpretation of the Fair Labor Standards Act's companionship exemption, 29 U.S.C. § 213(a)(15), embodied in the regulation?

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Stern, Robert L., et al., *Supreme Court Practice* (8th ed. 2002)	7

IN THE

Supreme Court of the United States

No. 04-1315

LONG ISLAND CARE AT HOME, LTD.,

and

MARYANN OSBORNE,

Petitioners,

v.

EVELYN COKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

The Solicitor General urges this Court to summarily vacate the Second Circuit's decision and remand this case to the Court of Appeals for reconsideration in light of the recent promulgation of Department of Labor Advisory Memorandum No. 2005-1 (Dec. 1, 2005). The Court should not summarily vacate or remand, but should instead deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

The Department of Labor participated fully in this case when it was before the Court of Appeals. The Department

filed a brief as amicus curiae. 55a-78a. In fact, counsel for the Department appeared at oral argument and presented argument in lieu of argument from the Defendant-Petitioner, Long Island Care at Home, Ltd.

The Court of Appeals issued its decision on July 22, 2004. The Petition for a Writ of Certiorari was filed in this Court on March 29, 2005. This Court invited the Acting Solicitor General to file a brief expressing the views of the United States on June 6, 2005. On December 1, 2005, without notice and comment rule-making, the Department promulgated Advisory Memorandum No. 2005-1. Brief for the United States at 1a-17a. The Solicitor General then filed the Brief of the United States on December 22, 2005, relying primarily on the Advisory Memorandum.

ARGUMENT FOR DENYING THE PETITION

I. THE POLICY MEMORANDUM SHOULD NOT AND WILL NOT ALTER THE COURT OF APPEALS' ANALYSIS OF THE REGULATION

The Policy Memorandum should not alter the Court of Appeals' analysis of the regulation, 29 C.F.R. § 552.109(a), for five reasons. First, in *Auer v. Robbins*, 519 U.S. 452 (1997), this Court made clear that "a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack" is not entitled to deference. *Id.* at 462 (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)). This is exactly what the Policy Memorandum is. In none of the cases cited by the Solicitor General to support his claim of deference did the agency promulgate its interpretation only after a court struck down its regulation as inconsistent with the governing statute.[1]

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[1] Indeed, the Court of Appeals' decision on the question of whether the regulation is a legal or interpretive regulation is consistent with a line of precedent dating back to at least 1993 holding that regulations promulgated by the Department construing statutory exemptions to the Fair

Second, the question at issue is *not* one of construction of a Department regulation, but rather classification of the regulation as legal or interpretive and determination of whether the regulation is consistent with the statute. The latter question is clearly not one involving construction of the regulation. Yet the Policy Memorandum consists almost exclusively of an argument addressed to the latter question—whether the regulation is consistent with the statute. Brief for the United States at 1a-16a. Only on the last two pages of the Memorandum does the Department address the classification of the regulation in a discussion occupying less than one page. *Id.* at 16a-17a.

The classification question is also not one involving construction of the regulation. The discussion of this issue in the Policy Memorandum does not contain any form of construction of any of the provisions of the regulation itself. Brief for the United States at 16a-17a. The classification of the regulation is not "a creature of the Secretary's own regulations" and thus the Secretary's arguments in the Policy Memorandum are entitled to no deference. *Auer*, 519 U.S. at 461.

Third, even if the Policy Memorandum were considered a construction of the regulation relevant to the classification issue, no deference is warranted because "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). Here, the regulations expressly and unambiguously state that the "definitions required by section 13(a)(15) [of the Fair Labor Standards Act] are contained in [the "General Regulations," specifically] §§ 552.3, 552.4, 552.5 and 552.6"

Labor Standards Act that are classified as "interpretations" by the Department and expressly not adopted pursuant to the Department's authority to "define and delimit" the statutory terms are not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Court of Appeals cited these earlier precedents. 22a. *See also* Brief in Opposition at 16-17.

and thus not in the Interpretations, including § 552.109(a). 29 C.F.R. § 552.2(c). The Policy Memorandum's assertion is directly contrary to this unambiguous statement in the regulations and is thus not entitled to deference.

Fourth, it is the agency's contemporaneous classification of the regulation that is relevant under *United States v. Mead Corp.*, 533 U.S. 218 (2001), not its *post-hoc* assertion in the Policy Memorandum. *Mead* holds that in order for agency action to qualify for *Chevron* deference, (1) Congress must delegate law making authority to an agency and (2) the agency action must be pursuant to that delegation. This Court held that *Chevron* deference is not appropriate "[1] where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or [2] where such authority was not invoked." 533 U.S. at 237. As explained in point three above, the Department did not invoke its statutory authority at the time it promulgated the regulation. That is the determinative point under *Mead* and it cannot be altered by subsequent agency assertion. Scholars have described *Mead*'s second prong as follows: "in *Mead* the Court made clear that it is only when the agency *actually employs* its delegated authority to make a legal determination that it will be accorded *Chevron* deference." Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1196 (2004) (emphasis added). *See also id.* at 1164. Indeed, even prior to *Mead*, scholars of administrative law agreed:

> When an agency has a choice to proceed legislatively or nonlegislatively, its *contemporaneous* description is the most reliable test of what it actually did. . . . [I]t is appropriate to accept the agency's description of which alternative it chose *at the time it made the choice.* Deference to the agency's label also promotes certainty and predictability of result and provides agencies with rea-

> sonable assurance that reviewing courts will honor their decision to proceed nonlegislatively.

Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 389 (emphasis added). In contrast, "[s]ubsequent characterization" of a regulation as legislative or interpretive should not be accorded deference. *Id.* at 390 n. 40. *See also Levesque v. Block*, 723 F.2d 175, 181 (1st Cir. 1983) ("agency's contemporaneous characterization of its action" is "highly relevant," but it would be "both unfair and disingenuous to allow the Secretary to say later that he didn't mean it. . . . [W]e are inclined to give little weight to an agency's *post hoc* reconstruction of its efforts and intentions.")

Fifth, the brief argument presented in the Policy Memorandum on the classification issue is unpersuasive as demonstrated by the fact that it is *not* the one presented by the United States in its Brief. *Compare* Brief for the United States at 16a-17a *with id.* at 10-13.

The promulgation of the Policy Memorandum also will not alter the Court of Appeals' analysis because the arguments it contains were already presented to the Court in a form entitled to no less deference. In its brief in the Court of Appeals, the Department argued that the regulation was entitled to deference under *Chevron*, *see* 64a-66a, and was consistent with the Fair Labor Standards Act, *see* 70a-73a. The Department expressly argued that "[l]ike section 552.6, section 552.109(a) serves to 'define and delimit' the terms of the 'companionship services' exemption under Congress' express delegation of authority." 66a. This Court held in *Auer*, 519 U.S. at 462, that the Department's construction of its own regulations, even "in the form of a legal brief," are entitled to deference. In fact, the Solicitor General argues that "the court of appeals should have deferred to DOL's construction of the regulations as set forth in the agency's amicus brief." Brief for the United States at 19 n. 8. But the Court of Appeals did appropriately and expressly consider the Department's position on these issues, specifically

whether the regulation was legal or interpretive—it simply rejected it. 23a-24a. The mere fact that the Department has now placed its arguments into a policy memorandum will not alter the Court of Appeals' decision.

The Policy Memorandum is nothing but a brief in a different form. It is not a regulation. It was not adopted pursuant to notice and comment rule-making. In fact, it states expressly that it is intended only for internal guidance: "to advise staff how to apply the Section 13(a)(15) companionship services exemption in light of the Second Circuit's decision in [this case.]" Brief for the United States at 1a. It presents arguments that could have been and were made by the Department in its brief and argument to the Court of Appeals. The arguments set forth in the Policy Memorandum are entitled to no more deference than the arguments already presented by the Department to the Court of Appeals. It is no exaggeration to state that the Solicitor General asks this Court to take the extraordinary step of summarily vacating the decision of the Court of Appeals based solely on the fact that the government has placed its argument in the form of an advisory memorandum.[2] The promulgation of the Policy Memorandum does not create a new circumstance justifying summarily vacating the Court of Appeals' decision and remanding for reconsideration.

II. EVEN IF THE POLICY MEMORANDUM ALTERS THE COURT OF APPEALS' ANALYSIS OF WHETHER TO ACCORD *CHEVRON* DEFERENCE, THE COURT WILL REACH THE SAME RESULT

Even if the promulgation of the Policy Memorandum were likely to alter the Court of Appeals' analysis of whether the

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[2] If the government's argument succeeds in this case, it could take the same tack in any case coming to this Court in a similar posture and, thereby, obtain two arguments in the court of appeals.

regulation is entitled to *Chevron* deference, the Court would reach the same result because, as we explained in our original Brief in Opposition, (1) even if the Court of Appeals' classified the regulation as a legal regulation, it would hold it invalid pursuant to the Administrative Procedure Act under binding Second Circuit precedent as strongly suggested in its opinion, *see* 24a-25a; *see also* Brief in Opposition at 26-27, and (2) even if the Court of Appeals accorded the regulation *Chevron* deference, the Court would hold the regulation invalid as inconsistent with the statute, *see* Brief in Opposition at 19-26. Therefore, this Court should not summarily reverse and remand because doing so will not change the relative rights of the parties in any concrete fashion. *See* Robert L. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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